IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

MISCELLANEOUS PETITION NO.37 OF 2001

SICOM Limited ..... Petitioner
versus
Shri Balkrishna
Himmatramka and Ors. ..... Respondents

WITH
MISCELLANEOUS PETITION NO. 38 OF 2001

SICOM Limited ..... Petitioner
versus
Shri Balkrishna
Himmatramka and Ors. ..... Respondents

WITH
MISCELLANEOUS PETITION NO. 39 OF 2001

SICOM Limited ..... Petitioner
versus
Shri Balkrishna
Himmatramka and Ors. ..... Respondents

WITH
MISCELLANEOUS PETITION NO. 22 OF 2002

MSFC Limited ..... Petitioner
versus
Shri Balkrishna
Himmatramka and Ors. ..... Respondents

Kevil Setalvad with M.P. Rege for the petitioner.
Mr. L. Bansal or respondent nos.1, 5, 7 and 8.

CORAM: S.U. KAMDAR, J.

DATE : 14TH MARCH, 2005.

JUDGMENT :

1. The present petition is filed under the provisions of section 31(1) (aa) of the State Financial Corporation Act, 1951. The petitioner is a financial institution. Some time in or about February, 1993 the company known as Sanjivani Agro Industries approached the petitioner with a request to grant a loan of more than Rs.110.00 Lacs for setting up a plant for solvent extraction and oil refinery at Plot no.A/1 in the Palus Industrial Area of MIDC within the village limits of Palus, Taluka-Tasgaon, District-Sangli.

2. The said application for grant of term loan was sanctioned by the company and the said loan amount was advanced by the petitioner to the said company. The company executed an indenture of mortgage dated 16.8.1993 securing the said loan amount and mortgaged the plant, machinery and building of the company with the said financial institution. The respondent herein being respondent no.1 to 4 have executed the deed of guarantee dated

16.8.1993 and the respondent no.2 and 5 has executed the deed of guarantee dated 20.9.1993 in favour of the petitioner herein guaranting the repayment of the aforesaid amount by the respondent company which is a principal debtor.

3. The said guarantee is unequivocal and inter-alia recites that on the default being committed by the company to make payment of any instalment amount the guarantors would be liable to repay the said amount to the petitioner herein. Pursuant to the aforesaid arrangement the loan amount was disbursed to the company and the company has utilised the same. The company made defaults in repayments of the aforesaid amount from time to time and thus committed breach of the terms and conditions of the said loan agreement. In the circumstances a legal notice was issued on 9.1.1998 by the petitioner recalling the said loan amount from the company.

4. It is the case of the petitioner that inspite of various demand notices and reminders the repayment

of the loan amount was not effected by the company and therefore the petitioner invoked the guarantees by notice dated 21.1.2000 and called upon the respondents to repay the aggregate dues of Rs.1,14,15,000/- . The company was declared sick by the board for industrial and financial reconstruction under the provisions of the Sick Industrial Company (Special Provisions) Act, 1985 and ultimately the board rejected the reference and recommended that the company should be wound-up. By order dated 17.1.2000 the said company has been wound up. In the circumstances the petitioners seek to recover the said amount against the respondent guarantors. The claim of the petitioner as on the date of the filing up of the petition is Rs.1,94,25,180.00/-. In pursuance of the directions of the apex court in the case of Central Bank of India vs. Ravindra and Ors. reported in (2002) 1 SCC 367. The petitioner has filed an affidavit in rejoinder setting out the up to date claim. The claim amount as on the said dated is of sum of Rs.4,37,69,240/-.

5. The affidavit filed by the petitioner

inter-alia states that the aforesaid amount of Rs.4,37,69,240/- was arrived at after giving due credit of Rs.1,30,00,000/- received towards the sale proceeds of the mortgaged properties. the said mortgaged properties were sold by the petitioner in exercise of power conferred under section 29 of State Financial Corporation Act, 1951.

6. The learned counsel appearing for the respondents have inter-alia contended before me that the present petition should be dismissed in the light of legal position narrated hereunder. It has been contended by the learned counsel for the respondent that the present petition is not maintainable in view of the judgment of the division bench of this court in the case of Maharashtra State Financial corporation vs. M/s. Jaycee Drugs and Pharmaceuticals Pvt. Ltd and Ors. reported in 1991 2 SCC 637. It was contended that in so far as the provisions of the SFC Act is concerned the same does not cover the cases of guarantor and it only applies in respect of mortgaged property. Thus the present petition cannot lie under the provisions of the said

Act. The learned counsel for the respondent corporation has rightly drawn my attention to the judgment of the apex court in the case of Mahrashtra State Financial Corporation vs/. Jaycee Drugs and Pharmaceuticals Pvt. Ltd and Ors reported in 1991 2 SCC 637 by which the division bench judgment of this court referred to above has been set aside and the appeal therefrom has been allowed. In so far the aforesaid contention of the respondent is concerned the Supreme court has expressly negatived the same in para-23 of the said judgment and in view thereof I do not find any substance in the arguments advanced by the learned counsel for the respondent and on the aforesaid count I reject the same.

7. The second contention of the learned counsel for the respondent that the sale proceeds which was received by the petitioner by disposing off the assets of the company has not been given credit. Even in respect of the said contention I do not find any merits because in the affidavit dated 4.1.2004 the petitioners have pointed out that the necessary credit has been given and after giving the necessary

credit the aforesaid amount is still outstanding and payable. In view thereof I do not find any merits in respect thereof.

8. The third contention of the learned counsel for the respondent that this court has no jurisdiction because the factory of the principal debtors i.e. the company is situated at Thane and the assets which were mortgaged were also situated in Thane and thus this court cannot invoke the jurisdiction. The said contention is plainly required to be rejected for the simple reason that all the eight respondents are residing at Bombay. The present petition is not filed either against the principle debtor or in respect of the mortgaged property but filed against the respondents in their capacity as guarantors. The deed of guarantees are admittedly executed in Mumbai and the amount thereunder is also payable at Mumbai. Admittedly the petition is filed only for receiving the claim arising under the deed of guarantee. There are no securities in respect of the said claim and thus in my opinion this court shall have jurisdiction because

all the respondents are residing at Bombay. Thus looking from either of the angle i.e. where the respondents are residing or where material part of cause of action has arose this court alone shall have jurisdiction to entertain and try the jurisdiction. I therefore do not find any merits in the aforesaid contention and therefore reject the same.

9. This leads me to the next contention advanced by the learned counsel for the respondent that the present petition is liable to be dismissed for non joinder of necessary parties. According to him the principle debtor is the necessary party and in absence of the principle debtor the present petition cannot be determined. Alternatively the learned counsel has also contended that there are two deeds of guarantees and in respect of both the guarantees separate proceedings should have been filed by the petitioner and there is a misjoinder of cause of action as well as respondents and therefore also the present petition is liable to be dismissed. In my opinion both the aforesaid alternate contention lacks any merits whatsoever. The present petition is filed

against the respondents in their capacity as the guarantors and that the amount received is also one single amount which is advanced to the principal debtor. Merely because two sets of gurantees are executed by two different sets of respondents I do not think it is necessary to file two different proceedings when cause of action is one and the same. I am also of the further opinion that the principle debtor is neither necessary not proper party to the proceedings initiated against the guarantor. It is well settled that liability of the guarantor and principal debtor is joint and several and thus independent suit and proceedings can be filed against them without impleading each other parties to the respective proceedings.

10. The last contention which is advanced by the learned counsel for the respondent was that the claim is barred by the law of limitation. According to the him the first default has been committed by the principal debtor long back and therefore the amount should have been claimed by the petitioner

immediately thereafter. The legal notice given is of 9.1.1998 and in the said notice the amount was required to be repaid immediately. The principle debtor which is the company has continuously defaulted in making the payment thereafter. The liabilities of the guarantors arises only after the guarantees are invoked and not prior thereto and therefore I find that the present petition is within time. In any event under the deed of guarantee the liabilities of the guarantors continue to subsist and coexist as long as the amount is not repaid by the principle debtor and therefore also I do not find any substance in the contention of limitation advanced by the learned counsel for the respondent herein. There is no merits in the any of the contentions advanced by the learned counsel for the respondents. In view thereof I pass the following order.

. The respondent no.1 to 8 are ordered and directed to pay jointly and severally to the petitioner a sum of Rs.4,37,69,240/- with interest thereon from the date of 1.2.2005 as

per the loan agreement. The respondent no.1 to 8 are also ordered and directed to pay the petitioner cost of the present petition.

. Learned counsel appearing for the respondent seeks stay of the order and judgement. Learned counsel appearing for the petitioner opposes for the said stay. Stay granted upto 15.4.2005.

sd/-

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